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Supreme Court of the United States

OCTOBER TERM, 1961

No. 861

JEFFERSON LAKE SULPHUR COMPANY,
Appellant

versus

STATE OF NEW JERSEY,
Appellee

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12,
Attorney for Appellant

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Stryker, Tams & Dill,
Arthur C. Dwyer,
Of Counsel

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versus

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JURISDICTIONAL STATEMENT

Appellant submits this statement to show that the instant appeal is within this court's jurisdiction, and that the question presented is both substantial and important.

Opinions Below

The opinion of the Supreme Court of New Jersey is reported at 35 NJ 577. That of the Superior Court, Chancery Division, Mercer County, the court of first instance, has not been reported. Both opinions are printed in the Appendix, at pages 7 and 27 respectively, below.

Jurisdiction

This suit was brought against appellant by the State of New Jersey, pursuant to sections 37-29 *et seq.*, Title

2A of the New Jersey Statutes, to obtain custody of funds assertedly subject to the State's custodial escheat law.

The judgment of the Supreme Court of New Jersey was entered on February 19, 1962. The notice of appeal was filed in the Supreme Court of New Jersey on March 9, 1962.

This court has jurisdiction of the appeal under 28 USC 1257(2). See *Western Union Telegraph Co. vs Pennsylvania*, 368 US 71 (1961); *Standard Oil Co. vs New Jersey*, 341 US 428 (1951); *Buchanan vs Warley*, 245 US 60 (1917).

Statutes Involved

The appeal involves the validity, under the Fourteenth Amendment to the Constitution of the United States, of sections 37-29 *et seq.* of Title 2A, New Jersey Statutes (New Jersey Laws, 1951, ch. 351), as applied in this case. The text of these provisions is set out in the appendix, at pages 39-40 below.

Question Presented

Does the Due Process Clause permit the State of New Jersey to forbid the shareholders of a corporation from providing, in their articles of incorporation, for disposition, in favor of the corporation, of dividends unclaimed by its shareholders, such prohibition by the State being based solely on the ground that such disposition would interfere with acquisition of the unclaimed dividends by the State itself under its escheat laws?

The Facts*

The initial escheat law of New Jersey provided for escheat to the State, of property unclaimed for fourteen years. That State's right, under that law, to escheat property of shareholders, in the hands of a multi-state corporation, was upheld by this Court. *Standard Oil Co. vs New Jersey*, 341 US 428 (1951).

In the same case, the Supreme Court of New Jersey had held that the State's right to escheat such unclaimed property is subject to the bar, in favor of the holder of the property, of New Jersey's six-year statute of limitations, as to all claims to which that statute is applicable. *State vs Standard Oil Co.*, 5 NJ 281, 74 A2d 565, aff'd, 341 US 428.

The State thereupon amended its escheat law to provide for "custodial escheat" (taking into custody of the State for eventual escheat) of moneys unclaimed for five years. New Jersey Laws 1951, ch. 304; NJSA 2A:37-29 *et seq.*

Not long afterward, the appellant New Jersey corporation's shareholders, acting on a suggestion by this Court in its *Standard Oil* decision (341 US at 436), amended their certificate of incorporation, to provide that dividends declared on appellant's shares should revert in full ownership to appellant, if not claimed within three years. R. 22a-24a, 67a-69a.

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* The transcript of the record consists of petitioner's appellate brief and the appendix thereto, the opinion and judgment of the Supreme Court of New Jersey, the notice of appeal to this Court, and respondent's appellate brief and cross-designation of record to be certified.

The State thereafter brought this suit, to obtain custodial escheat of dividends which had reverted to appellant under this provision of its certificate of incorporation.

In its answer, appellant pleaded that if New Jersey's custodial escheat law should be held applicable to these dividends, the law would violate the Fourteenth Amendment of the Constitution of the United States, by depriving appellant of its property without due process of law. R 8a.

The trial court rendered judgment for the State (R 29a), necessarily, though tacitly, rejecting appellant's constitutional plea (R 31a-38a); and appellant appealed, again, raising the constitutional question in its appellate brief, as required by Rule 1.7:1c of the Supreme Court of New Jersey. R 1.

The judgment of the trial court was affirmed by the Supreme Court of New Jersey (which had certified the appeal on its own motion pursuant to its Rule 1:10-1), on the ground that the provision of the certificate of incorporation at issue, is violative of the policy of the State's custodial escheat law, and hence invalid. Appendix to this brief, pages 7 *ff.**

* The failure of the Supreme Court of New Jersey to discuss, in necessarily rejecting, the constitutional issue raised by appellant, does not deprive this Court of jurisdiction of this appeal. *Schlemmer vs Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 US 1, 11 (1907). It should be noted that the opinion of the Supreme Court of New Jersey discusses an alternative constitutional plea—impairment of contracts (see appendix, page 18 below)—which was expressly withdrawn when the case was argued, but does not mention the Due-Process issue which was argued at length.

The Question is Substantial

Twice in recent years, this Court has decided questions arising under state escheat laws. *Western Union Telegraph Co. vs Pennsylvania*, 368 US 71 (1961); *Standard Oil Co. vs New Jersey*, 341 US 428 (1951).

Each of the cited cases involved the question of jurisdiction to escheat unclaimed property held by multistate corporations; and the earlier of the cases also upheld the validity of New Jersey's law under the Impairment-of-Contracts Clause, as to escheat of unclaimed property belonging to the corporation's shareholders.

The case at bar presents a new phase of this escheat problem, an issue expressly described by the Supreme Court of New Jersey as "one of novel impression", involving the more fundamental question whether a state may prohibit, for no other reason than to facilitate its own seizure of shareholders' property by escheat, anticipatory disposition thereof in favor of the corporation, by appropriate provision inserted by the shareholders themselves, in their articles of incorporation.

The escheat decisions of this Court have demonstrated the growing use of the escheat device by the states; have established that the right to dispose of property, like the right to contract, is protected by the Due-Process Clause from arbitrary restraint, *Buchanan vs Warley*, 245 US 60 (1917), *Wolff Co. vs Industrial Court*, 262 US 522 (1923); and have indicated that a disposition of the type here at issue would be valid as against such escheat. See *Standard Oil Co. vs New Jersey*, 341 US 428 at 436 (1951).

It is appellant's position that for the State of New Jersey to forbid disposition of property, on the sole ground that it would interfere with appropriation of the property by the State itself, is the *ne plus ultra* of arbitrary deprivation of property without due process of law.

It is respectfully submitted that, in any event, the question presented is novel and substantial, and is of such importance as to warrant plenary consideration by this Court.

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12,
Attorney for Appellant

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Stryker, Tams & Dill,
Arthur C. Dwyer,
Of Counsel

April, 1962

APPENDIX

SUPREME COURT OF NEW JERSEY

A-42 September Term 1961

STATE OF NEW JERSEY, by David D. Furman, Attorney General of the State of New Jersey,
Plaintiff-Respondent,

vs.

JEFFERSON LAKE SULPHUR COMPANY, a corporation of the State of New Jersey,
Defendant-Appellant.

Argued November 21, 1961. Decided

Mr. Charles J. Kehoe, Deputy Attorney General, argued the cause for plaintiff-respondent.
(*Mr. David D. Furman*, Attorney General, attorney.)
Mr. Eberhard Deutsch, of the Louisiana Bar, argued the cause for defendant-appellant.
(*Messrs. Stryker, Tams & Dill, attorneys;*
Mr. Arthur C. Dwyer, and Mr. René H. Himel, Jr. (Messrs. Deutsch, Kerrigan & Stiles) of the Louisiana Bar, of counsel.)

The opinion of the Court was delivered by
FRANCIS, J.

The Chancery Division of the Superior Court declared invalid an amendment to the charter of the defendant corporation which was designed to circumvent the Custodial Escheat Act, L. 1951, c. 304, *N.J.S.A.* 2*A*:37-29, *et seq.* The subsequent appeal from the decision was certified on our own motion before argument in the Appellate Division.

Jefferson Lake Oil Co. was incorporated in Louisiana in 1928. Later, its name was changed to Jefferson Lake Sulphur Company, Inc. Defendant Jefferson Lake Sulphur Company was created in New Jersey on March 30, 1949. The Louisiana corporation was merged into the New Jersey company on December 30, 1949. Under the merger agreement Louisiana stockholders were entitled to exchange their shares for shares of the New Jersey product corporation. It provided also that all "debts, liabilities and duties" of both companies would survive the merger and become in all respects the obligations of the product corporation. That result would have followed in any event by operation of law. See *State v. Union Bag-Camp Paper Corp.*, 35 N.J. 390 (1961).

Prior to the merger, and more particularly between 1933 and 1949, the Louisiana corporation had declared dividends on its stock. On each declaration the funds for payment were transferred to a special dividend account in a New Orleans bank. Eventually the dividends unclaimed by stockholders were deposited in one account where they remained until called for by the stock owner. Louisiana had no escheat statute which applied to these dividends.

Subsequent to the merger and down to June 5, 1953 (five years prior to institution of this action), the resulting New Jersey corporation declared dividends on its outstanding stock. In each instance the same practice was followed with respect to deposit thereof in a separate account, the depositary being a New York bank.

On July 13, 1951, New Jersey enacted the Custodial Escheat law, *L.* 1951, c. 304, *N.J.S.A.* 2*A*:37-29, *et seq.* It provides that:

> "• • • [T]he state may take into its protective custody property consisting of cash, dividends, interest, or wages owed by any corporation organized and doing business under the laws of this state, belonging to any person remaining unknown, or whose whereabouts is unknown, or whose property remains unclaimed as defined herein for a period of 5 successive years; and after a period of protective custody has expired as herein prescribed, the state may proceed to escheat such property to itself." *N.J.S.A.* 2*A*:37-29.

The procedure established to obtain possession of the property is a summary action in the Superior Court brought by the Attorney General in the name of the State. And the Court is authorized to direct a corporation such as defendant to deliver the property to the State Treasurer for safekeeping. *N.J.S.A.* 2A:37-30,31. As a further aid to the effectiveness of the remedy, a specific duty was imposed upon the person having knowledge or information concerning escheatable property to notify the Attorney General within a reasonable time. *N.J.S.A.* 2*A*:37-42. Basically, the legislative purpose was to confer upon the State the right to possession of certain intangible personalty in ample time to avoid the application of the six-year statute of limitations. *State v. Union Bag-Camp Paper Corp.*, *supra* at 393. As we said in *Union Bag*, reasonably prompt notice is contemplated. Failure to give the notice will bar reliance on the statute of limitations. *State v. United States Steel Corp.*, 22

N.J. 341, 355-360 (1956). Thus, as a matter of public policy as projected by the Legislature, at the end of five years after the declaration of corporate dividends, the State acquires an accrued right to possession of those remaining unclaimed, a right partaking of the characteristics of an equitable lien. *State v. Union Bag-Camp Paper Corp., supra* at 398.

About four months after the adoption of the Custodial Escheat statute, defendant engaged in a frankly admitted effort to circumvent its application. On December 5, 1951, the Board of Directors adopted a resolution recommending amendment of the certificate of incorporation by adding Article (n) as follows:

> "As to every dividend on any stock of this company or any of its predecessors, which shall remain, or has remained, unpaid and unclaimed for a period of three years following the date on which it was payable, the funds set aside for payment of such unclaimed dividend shall be reclaimed by, and shall revert in full ownership to, this corporation, and the obligation of this corporation to pay such dividend shall thereupon cease; provided that the board of directors may, at any time, for any reason satisfactory to it, but need not, authorize the officers of the company to pay to the entity theretofore entitled thereto the amount of any dividend, ownership of which will have reverted to the company under the provisions hereof."

No such provision was in the certificate of incorporation of the Louisiana company.

Further amendments, Articles (o) and (p), were recommended also. The purpose of Article (o) was to bring about a reversion of ownership to the defendant of any shares of its stock which, under the merger agreement, were to be issued in substitution for stock of the Louisiana corporation but which remained unclaimed by January 1, 1953. As of that date, such shares would be issued in the name of defendant. The aim of Article (p) was to bring about a transfer to defendant of title of any shares of defendant's stock which had been issued or were issuable as a stock dividend, or pursuant to a stock split up or any other plan of recapitalization or reorganization, whenever such shares remained unclaimed for three years. The Board of Directors was given the same discretion to issue to the original owner the stock so "escheated" to the corporation under Articles (o) and (p) as under Article (n). Although the principle involved is the same, the validity of (o) and (p) is not specifically involved in the present litigation.

As can be seen by the Article (n) amendment, defendant in effect undertakes to establish a private escheat law for itself and to interpose it between the corporate entity and the State. Moreover, the amendment sets up the Board of Directors as a private judicial tribunal and invests it with broad discretion, unlimited as to time, to decide whether, for any reason deemed sufficient by it, payment should be made subsequent to the expiration of the three-year period to a stockholder whose unclaimed dividends have been "escheated" to the corporation. This portion of the amendment apparently was designed to substitute for *N.J.S.A.* 2*A*:37-40 which authorizes the

Superior Court at any time within seven years after the final judgment of escheat to reopen the proceedings and for specified reasons to direct payment to a stockholder of previously unclaimed dividends.

To accomplish the purpose of amending the charter, the Board of Directors mailed to all stockholders of defendant and of the Louisiana corporation a notice of special meeting and a proxy statement explaining the matter. The explanation of Article (n) was that its object was "to provide that all dividends on the company's stock, unclaimed for three years after the date payable shall revert in full ownership to the company." That statement was not accurate. The proposed amendment not only related to defendant's dividends but to those of "any of its predecessors", i.e., the Louisiana company, as well. Furthermore, the explanation said that the amendments ((n), (o) and (p)) were prompted by the New Jersey Escheat law, "under which all money payable to others by New Jersey corporations, unclaimed by the owner for five years, and all other property held for others by such corporations, unclaimed by the owner for fourteen years, becomes the property of the State of New Jersey." The inaccuracy of that information is patent. Under the Act, custody of the unclaimed dividends, not title to them, is transferred to the State Treasurer at the order of the Superior Court after the five-year period. But title does not pass until at least two more years have elapsed without claim by the true owner in which event a judgment of escheat may be entered. And even upon the entry of an escheat judgment, at any time within seven additional years there-

after, the proceedings may be reopened and the stockholder's share, plus interest thereon, ordered released to him, if he did not have *actual knowledge* of the escheat action. In addition to the described lack of information, the statement failed to advise of the safeguards imposed on the State as to notice to stockholders of the custodial escheat action and of the later proceeding for judgment of escheat. Even assuming that the charter change under review was not *ultra vires*, in a situation where a corporation seeks to influence its stockholders to "escheat" their property to it rather than have it pass to the State, the fiduciary status which the corporation occupies with respect to the unclaimed dividends calls for full and fair disclosure of all the relevant facts upon which the stockholders' decision should be formulated. Obviously the obligation was not adequately discharged by the proxy statement and that reason alone is sufficient warrant for invalidating the amendment. But in our judgment disposition of the matter should not be based upon or limited to issues of procedural infirmity. The importance of the basic question of corporate authority to amend the charter in the fashion attempted here urgently requires decision on the merits. Accordingly, we return to the chronology of events in connection with the proposed amendment.

The record reveals that on December 12, 1951 the special meeting to consider the proposed charter addition was held. The amendment was approved by slightly more than two-thirds of the common and 52+% of the preferred stockholder votes of the New Jersey corporation. At that time there were outstanding 349,227 shares of

common and 97,502 shares of preferred stock; 248,574 shares of common voted for and 1,520 shares voted against the addition; 99,133 shares did not vote. Of the outstanding 97,502 shares of preferred stock, 51,007 shares voted favorably and 1,355 unfavorably; 45,160 shares did not vote. At the date of the meeting, 355 shares of the preferred and 1,146 shares of common stock of the Louisiana corporation had not been exchanged for shares in the New Jersey corporaton as provided by the merger agreement. The inference is inescapable that those unconverted shares did not vote for the amendment to the charter.

Following inclusion of the amendment in its charter, defendant transferred from the special dividend bank account to its earned surplus $5,234.97 in unclaimed dividends of the Louisiana corporation, and $422.49 in dividends on its own stock which had not been claimed for three years. Whether any shares of stock of the Louisiana company which had not been exchanged for defendant's shares for more than three years (two years of which followed adoption of Article (o)) were appropriated and transferred to its ownership under the Article (o) amendment, does not appear. It may be noted here that notice of the stockholders' meeting to consider the proposed amendments was not given to the Attorney General, although the State then had an accrued right to custody under the 1951 Custodial Escheat Act of a substantial portion of the unclaimed dividends of the Louisiana corporation. Likewise, it is plain that no report of such dividends as had been unclaimed for five years prior to July 12, 1951, the effective date of the

Act, had been given to the Attorney General as required by *N.J.S.A.* 2*A*:37-42, *supra*, down to the date of these proceedings.

On June 6, 1958 the State instituted this action against defendant under the Custodial Escheat law to obtain possession of all dividends which had been unclaimed for at least five years. The Chancery Division entered judgment for $5,657.46, representing the total of the unclaimed dividends of the Louisiana and New Jersey corporations. On appeal therefrom, defendant argues that a corporate charter may validly limit the time within which a stockholder may claim dividends declared and set aside for him, and may validly provide for the reclaiming of them by the corporation and the reversion of ownership to it. We cannot agree.

When a corporation declares a dividend and specifically sets apart a fund in a separate bank account for purposes of its payment, the fund becomes the property of the stockholders distributively. *Martindell v. Fiduciary Counsel, Inc.*, 133 N.J.Eq. 408, 414 (E. & A. 1942). Because of continued possession of it however, the corporation takes on the cloak of a trustee for the stockholders with respect to payment thereof to them. Such moneys once so separated from the general assets of the entity are trust funds for the payment of the dividend and cannot be diverted by it for any other purpose. *State v. Standard Oil Co.*, 5 N.J. 281, 300-303 (1950); 13 *Am.Jur., Corporations*, § 673. The nature of the trust is such that the term "stakeholder" has been applied to describe it. The obligation of the corpora-

tion is ministerial, i.e., to turn over or to deliver to each stockholder his proportionate share of the fund upon proper request by him. Except for the naked right to custody, it has no legal or moral claim to the fund. *State v. Sperry & Hutchinson Co.*, 23 N.J. 38, 44 (1956); *State v. American Sugar Refining Co.*, 20 N.J. 286, 297 (1956).

The State in its quest for legitimate revenue has exercised its sovereign power as ultimate heir to abandoned or unclaimed personal property by assuming protective custody thereof when no claim for possession has been made by the true owner within five years. And it has ordained that ownership shall pass to it after the passage of two more years without request for payment by the owner, subject to the qualification that thereafter an owner who did not have actual knowledge of the escheat proceedings may recapture his property at any time within an additional seven years. *N.J.S.A.* 2*A*:37-30, 34, 39, 40. The statute represents the public policy of the State and it manifests the legislative will that such unclaimed moneys be used for the good of all of our citizens. Support for the enactment is found in the police power, the exercise of which in this area does not offend constitutional provisions with respect to due process and protection of property or contract rights. *State v. Standard Oil Co.*, 5 N.J. 281, *supra*, *affirmed sub nom. Standard Oil Co. v. State of New Jersey*, 341 U.S. 428, 95 L.Ed. 1078 (1951); *A. P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 158-160 (1953).

Defendant came to New Jersey and incorporated here, taking advantage of our liberal corporation law, *N.J.S.A.* 14:1-1, *et seq.* The Act provides that the certificate of incorporation may contain

> "* * * any provision, *consistent with law*, which the incorporators may choose to insert, for the management of the business and the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, its directors and stockholders or any class of stockholders." (Emphasis ours.) *N.J.S.A.* 14:2-3.

Defendant's charter, which was prepared by the incorporators, authorized it

> "(1) to mine for, and to process, sulphur, gas, oil, and other petroleum products and minerals; and to acquire, lease, construct and operate mining and drilling equipment and wells, machinery, tanks, pipe lines, refineries, transportation facilities and any and all other works, and real and personal property, used in connection therewith.
>
> (2) Generally, to engage in any activities, businesses, occupations or enterprises permitted by law to corporations; and to do each and every thing suitable or incidental to the accomplishment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to, or expedient for, the protection or benefit of the corporation."

A charter granted under the General Corporation Act includes, as if written therein, the provisions of

the statute under which it was issued and all applicable general laws. In the event of any conflict between them, the charter must yield. Also, within the limits of Federal and State Constitutions, any conflict subsequently arising because of legislation adopted pursuant to the State's reserved power or control over corporate activity must be resolved in the same fashion. The later expression of the legislative will is deemed a legitimate curtailment of the authority conferred by the certificate of incorporation. The new statute operates in effect as an amendment of the charter. *In re Collins-Doan Co.*, 3 N.J. 382, 390 (1949); *A. P. Smith Mfg. Co. v. Barlow, supra; State v. American Sugar Refining Co., supra* at 295, 296; *Faunce v. Boost Co.*, 15 N.J.Super. 534 (Ch.Div. 1951). Moreover, the state of the law is not only a continuing constituent part of the contract between the sovereign and the corporation, but stockholders purchase their stock subject to it, and it becomes an integral part of their contract with the corporation and with each other. *State v. American Sugar Refining Co., supra* at 296; In re *Collins-Doan Co., supra* at 390, 391; *Gen. Invest. Co. v. Amer. Hide & Leather Co.*, 97 N.J.Eq. 214, 224 (Ch. 1925), *aff'd* 98 N.J.Eq. 326, 330 (E. & A. 1925); *Warren v. 536 Broad Street Corp.*, 4 N.J.Super. 584, 592, 593 (Ch. 1949), *aff'd* 6 N.J.Super. 170 (App.Div. 1950).

The powers of the corporation cannot be enlarged by including provisions ostensibly bestowing them in the certificate of incorporation, if such powers are obnoxious to any applicable general law or to public policy. *Costello v. Thomas Cusack Co.*, 96 N.J.Eq. 83

(Ch. 1922), *aff'd* 94 N.J.Eq. 423 (E. & A. 1923); *Terwilliger v. Graceland Memorial Park Ass'n*, 35 N.J. 259 (1961); *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, 130 U.S. 1, 32 L.Ed. 837 (1888); *Bullard v. National Eagle Bank*, 85 U.S. 589, 21 L.Ed. 923 (1873); *National Ass'n of C. P. Accountants v. United States*, 292 F. 668 (Ct. of App. D.C. 1923); *Hartnett v. Plumbers' Supply Ass'n*, 169 Mass. 229, 47 N.E. 1002 (1897). Nor can they be expanded in such case by amendment of the charter or by adoption of by-laws with the assent of the stockholders. *National Trust Co. v. Miller*, 33 N.J.Eq. 155, 162 (Ch. 1880); *Benintendi v. Kenton Hotel*, 294 N.Y. 112, 60 N.E.2d 829 (1945); 13 *Am. Jur., Corporations*, §§ 152, 156.

The will of the sovereign state is that dividends unclaimed for five years shall be amenable to its statutorily declared right of custodial escheat. Defendant corporation owes its existence to the same sovereign and subjection to the policy of acquiring and using such dividends for the common good must be deemed the price of incorporation. Thus, even though the Escheat Acts did not take the form of express amendments to the General Corporation Act, they became part of the laws of our State and binding on defendant company and its shareholders in their relations with the company. *State v. American Sugar Refining Co., supra* at 296. And so, as a result of the merger, ownership of the stock of the Louisiana corporation and dividends thereon, and ownership of the stock of the New Jersey corporation and dividends thereon, became subject to the paramount public policy with respect to escheat.

It is true, as suggested by defendant, that the Corporation Act confers broad power of amendment of its charter. *N.J.S.A.* 14:11-1. But that authority cannot rise higher than its source, and any amendment to achieve legal life must serve a legitimate corporate purpose as measured by the enabling legislation and general laws exhibiting the controlling public policy of the State. Alteration of a charter for the avowed purpose of defeating a relevant aspect of the sovereign's declared public policy cannot achieve judicial approval. Such a bootstrap operation signifies only the appearance of power, not the substance. Power in such an area can only be delegated by the Legislature; it cannot be assumed by the corporation nor can the courts confer it. The only safe rule is that a corporate entity may do no act except in subordination of the laws of the State. Whenever a rule is sought to be established by charter or amendment thereof or by-law, which interferes with or endangers the efficacy of a declared public policy, authority therefor emanating from the creating power must be shown to legalize it. *Cf. Taylor v. Griswold*, 14 N.J.L. 222, 235 (Sup. Ct. 1834).

Escheat of unclaimed dividends serves the important public need of providing revenue to be utilized for the common good. This was recognized at common law as well as by the statute. Support for a corporate measure to bring about such a marked interference with that declared legislative purpose as defendant proposes here must be found in a clear expression of statutory authority. 6 *Fletcher, Cyclopedia Corpora-*

tions, § 2491; 7 *Id.* § 3652. Additional emphasis may be placed on the requirement for that authority in cases like this where the charter amendment in question not only runs counter to the Escheat Act but also to the course and spirit of the common law with respect to escheat, and to the spirit of the statutes of wills and intestate devolution of personalty.

The issue presented by this appeal is one of novel impression. No case in point has been discovered or cited specifically dealing with it. Defendant places reliance on *Armant v. New Orleans & C. R. Co.*, 41 La. Ann. 1020, 7 So. 35 (1889), and *In re The Sydney Permanent Freehold Land & Building Company Limited*, 51 *Weekly Notes* 146 (Australia, Ch. 1934). Neither case is in point. In the former, although the charter contained a clause similar to the one under study here, no escheat statute was either involved or considered; in the latter, a statute expressly authorized the company to forfeit all dividends not claimed for three years.

There are to be found in the reports, however, cases dealing generally with efforts by corporations to engage in business practices, or to include provisions in their charters or by-laws, which are repugnant to the Corporation Act or general laws or public policy. By analogy they brand this defendant's charter amendment as *ultra vires*.

In *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, *supra*, one railroad company leased to

another company for a long term its road and appurtenances, franchise and right to exercise its powers. No authority appeared in the statutes relating to corporations which expressly or impliedly authorized such a lease by one or the acceptance of it by the other. Answering the argument that the corporate action found support by implication in the broad language of the charter, and striking down the lease, the United States Supreme Court declared that in determining the extent of a grant of power by the State all doubtful points of construction must be resolved against the grantee and in favor of the government or the public. Moreover, it pointed out that the manner in which the granted powers are to be exercised "and their subjection to the restraint of the general laws of the State and its principles of public policy" cannot be enlarged in any sense by inserting in the certificate of incorporation the authority to depart therefrom.

In *Bullard v. National Eagle Bank, supra,* the articles of association contained a provision regulating the transfer of stock in cases where the stockholder was indebted to the corporation. A by-law was adopted in aid of the charter to the effect that no transfer could be made until the debt was satisfied, unless the Board of Directors ordered otherwise. The statute under which the incorporation was accomplished conferred general power to provide for the regulation of the bank's business and the conduct of its affairs, and authorized the promulgation of by-laws, "not inconsistent with the provisions of this Act", defining and regulating "the manner in which its stock shall be

transferred." It appeared that the statute under which the bank was formed was a substitute for an earlier enactment which expressly ordained that no stockholder should have the right to transfer or sell his stock so long as he was liable as principal debtor or surety or otherwise to the corporation for any debt which had become due and remained unpaid. That section was left out of the substituted act, apparently because Congress considered it to be inconsistent with the new Currency Act, the policy of which was to permit no liens in favor of a bank upon shares of its stock in the hands of its debtors. The bank argued that although the law under which it was incorporated did not itself create a lien on a debtor's stock, as did the earlier act, it did by its words, which permitted regulation of the manner of transfer of stock, authorize the creation of a limitation on transfer by the charter and by-laws made under it. In rejecting the contention, the Supreme Court held that such an implication was inadmissible because it contradicted the spirit of the law. And it said that a by-law giving the bank a lien upon the stock against indebted stockholders ought not to be considered as a regulation of its business or a regulation for the conduct of its affairs.

In *National Ass'n of C. P. Accountants v. United States, supra*, the Association had been incorporated under a section of the Code of the District of Columbia which authorized citizens to organize for educational purposes. The particular section made no mention of a power to confer degrees. The certificate of incorporation provided, however, that the corporation "shall

have the power to admit its members to the degree of certified public accountant" upon satisfactory proof of knowledge and after passing a prescribed examination. The Court of Appeals held the charter provision invalid. It said that a corporation can have no powers except those expressly conferred on it, and such incidental powers as may be reasonably necessary to carry into effect those expressly granted. No express authorization to grant degrees appearing in the statute and the authority not being reasonably necessary to execute the powers conferred, because the Association could do all the statute contemplated without admitting to degrees, the power to do so could not be deemed to exist. The Court said also that the corporation could not assume powers to itself by the mere declaration in the charter that it had them.

Other examples of charter provisions or by-laws which have been condemned as offensive to public policy or contrary to express or implied provisions of legislative enactments, are to be found. A by-law is opposed to public policy when it provides that a stockholder may not sell goods to a competitor unless he pays to his own corporation a fixed sum per item sold, and that avoidance of the requirement makes him liable to the forfeiture of his stock, *Burns v. Wray Farmers' Grain Co.*, 65 Colo. 425, 176 Pac. 487 (1918). A by-law which prescribes that no action should be taken except by unanimous vote of all of the directors, was held to flout the plain purpose of the legislature in authorizing action by quorums. In this situation also the court rejected a contention that, even if in-

valid as between corporation and stockholder, the by-law should be deemed valid as a contract between the stockholders *inter sese*. In doing so it said that the state has an interest in seeing that such private laws or by-laws as the corporation adopts are not inconsistent with public law. *Benintendi v. Kenton Hotel, supra;* and see *Note*, 15 *Wyo. L. J.* 207 (1961). A clause in a charter forfeiting the shares (on payment to him of full value) of any stockholder who commenced or supported any suit against the company or its directors, was adjudged unlawful. *Hope v. International Financial Society*, 4 L.R. (Ch. Div. 1876-77) 327. A provision in a certificate of incorporation that the company's profits may be reinvested in real estate does not enlarge its powers nor permit it to hold distributable profits indefinitely nor for remote or indefinite prospects of reinvestment. *Leviton v. North Jersey Holding Co.*, 106 N.J.Eq. 517, 521 (Ch. 1930).

In *Jackson v. Hooper*, 76 N.J.Eq. 592 (E. & A. 1919), two individuals, having acquired all the stock of a corporation, agreed to act as partners in equal control and management of the company which would then continue as a corporation in form only. The agreement was declared illegal as obnoxious to public policy and to the authority of the legislature with respect to the establishment and operation of corporations. See also, *Prindiville v. Johnson & Higgins*, 92 N.J.Eq. 515, 520 (Ch. 1921), *aff'd* 93 N.J.Eq. 425 (E. & A. 1921).

These cases are, of course, not dispositive of the present problem. They do establish, however, that a

certificate of incorporation is the measure of corporate capacity, and in the event a power assumed therein conflicts with a general law enacted by the Legislature for the common weal, the power must yield.

A certificate of incorporation, as prepared by the incorporators and filed under the General Corporation Act, stands in the place of a legislative charter. To the extent that it, or an amendment thereof, is framed in accordance with all applicable law and public policy, it is a substitute for legislation. But it cannot be a substitute for a general statute with which it conflicts or which it was plainly intended to circumvent. In such case, particularly where the actual or inevitable conflict, as in the case of the Custodial Escheat Act, is with a legislative pronouncement representing the broad public policy of the State, the private legislation must yield.

Subversion of the Escheat Act is not a legitimate business purpose of defendant corporation. If the questioned charter amendments were adjudged valid, undoubtedly the Legislature would shorten the period for acquisition of the right of custodial escheat by the State to less than the three years prescribed by defendant for reversion of the unclaimed dividends or stock to it. The unseemliness of such a race must be apparent, and probably would be followed or anticipated by an amendment of the General Corporation Act or the Custodial Escheat Act banning charter provisions or by-laws designed to defeat escheat. But we do not have to contend with any such legislative action at this time.

In our judgment, the attempted interposition of defendant's private escheat law is clearly opposed to the spirit and essence of the public custodial escheat law and to the broad public policy represented thereby. In such a conflict the private law cannot survive. Accordingly, the amendment to its charter is adjudged invalid, and the judgment below is affirmed.

Opinion of the Superior Court Chancery Division

Before:
FRANK J. KINGFIELD, A. J. S. C.
State House Annex
Trenton, New Jersey

Tuesday, January 10, 1961

Appearances:
HARRY J. DIAMOND, Esq.,
Attorney Specially Designated to Prosecute this Action.

STRYKER, TAMS & HORNER,
by Arthur C. Dwyer, Esq., Attorneys for the Defendant.

(René H. Himel, Jr., Esq. (Deutsch, Kerrigan & Stiles), of Counsel) (La. Bar).

The Court: This is a custodial escheat action. The facts have been stipulated, and they are as follows:

Jefferson Lake Oil Company was incorporated in the State of Louisiana on July 24, 1928.

On February 15, 1940, the name of this corporation was changed to Jefferson Lake Sulphur Company, Inc.

Jefferson Lake Sulphur Co., the defendant in this case, was organized under the laws of New Jersey on March 30, 1949, and on December 30, 1949, the Louisiana corporation was merged into the defendant. It is pointed out in the Stipulation of Facts that the agreement was overwhelmingly approved by the shareholders of the Louisiana corporation at a special meeting held on July 26, 1949, and that the shareholders of the defendant corporation approved the agreement unanimously.

On November 5, 1951, the Board of Directors of the defendant adopted a resolution amending the defendant's Certificate of Incorporation to add an article which has been referred to as Article (N). The proposed Article (N) provides:

"As to every dividend on any stock of this company, or any of its predecessors, which shall remain, or has remained, unpaid and unclaimed for a period of three years following the date on which it was payable, the funds set aside for payment of such unclaimed dividend shall be reclaimed by, and shall revert in full ownership to, this corporation, and the obligation of this corporation to pay such dividend shall thereupon cease; provided that the Board of Directors may, at any time, for any reason satisfactory to it, but need not, authorize the officers of the company to pay to the entity theretofore entitled thereto the amount of any

dividend, ownership of which will have reverted to the company under the provisions hereof."

In the Notice which was sent to the stockholders, the purpose of this amendment was "prompted by the recently adopted New Jersey escheat law under which all money payable to others by New Jersey corporations unclaimed by the owner for five years and all property held for others by such corporations, unclaimed by the owner for fourteen years becomes the property of the State of New Jersey."

The special meeting was held, as I said before, on December 12, 1951, and there were outstanding some 97,500 shares of preferred stock and 349,000 shares of common stock. At this meeting the shareholders voted over whelmingly in favor of the resolution. However, a large number of shareholders did not vote on this amendment.

There are a number of persons to whom dividends were payable by the Louisiana corporation which were unpaid at the time of the merger, and which persons had a right to become shareholders in defendant corporation. And there were also a number of persons to whom dividends payable by the defendant were unpaid prior to the adoption of Article (N), but which person were shareholders of the defendant at the time Article (N) was adopted. And likewise there are a number of persons who became shareholders of the defendant after the adoption of Article (N), and to whom dividends payable by the defendant were unpaid.

The procedure which was followed by the Louisiana corporation in declaring dividends is set forth in the Stipulation of Facts, in that when a cash dividend was declared, the Louisiana corporation transferred funds, and from uncashed checks or those returned as undeliverable, the amounts were transferred to a special unclaimed dividend account in the same bank where the funds remained until claimed by the shareholders entitled thereto.

The defendant corporation declared dividends from the date of the merger on its common and preferred stock, and the first dividend was declared under date of February 23, 1950, to shareholders of record at the close of business on February 28, 1950.

It is admitted that the State of Louisiana had no escheat or custodial escheat law which applied to claims against the Louisiana corporation.

The defendant mailed all notices relative to the transactions referred to in this action to the last known addresses of the persons to whom such notices were sent as such addresses appeared upon the books of the defendant corporation. The defendant has no knowledge whether all the persons actually received said notices.

It is also admitted that the certificates for the shares of stock in the Louisiana corporation and the certificates issued by the defendant did not contain any statement about the provisions of amendment (N) of the defendant's charter.

The defendant did file a certificate of Amendment (N) with the Secretary of State on December 17, 1951, as required by the corporation act.

The defendant contends that the shareholders of a New Jersey corporation may legally provide for the reversion to the corporation of dividends unclaimed at the end of three years, as provided for by this amendment. The defendant contends that such an amendment is permitted by the corporation act, which fact is denied by the plaintiff, and the defendant relies upon two decisions, one of the Supreme Court of Louisiana in Armant v. New Orleans & C. R. Co., 41 La. Ann. 1020, 7 So. 35 (1889), a decision wherein there was an action to recover dividends on stock of a corporation which had merged into another corporation, and reliance was placed upon a provision in the charter of the successor corporation that, "Any dividend not called for within three years from the date of being made payable shall revert to the company." And in that case such an amendment or provision was held valid.

And in the case of In re The Sydney Permanent Freehold Land and Building Company Limited, 51 Weekly Notes 146 (Australia) (1934) where again the charter provisions provided for forfeiture of unclaimed dividends after the lapse of a stated time was held valid.

The defendant also contends that this article is a valid disposition of dividends prior to adoption of the amendment, due and payable to shareholders of record at the time of adoption of the article. In a sense setting forth that at least there remained one and one-third years before

the earliest dividend of defendant would revert to it if unclaimed.

It is based upon an analogy of the state adopting a statute of limitations as to claims which had never been the object of such a statute, recognizing that so long as the holder of a claim subject to limitations is afforded a reasonable time within which to assert his claim, that he is neither deprived of property nor of any vested right without due process of law, nor is his contract deemed to be impaired.

Likewise that this article is a valid disposition of dividends declared by the Louisiana corporation, due and payable to persons who had an inchoate right to become shareholders of defendant at the time Article (n) was adopted.

The defendant also contends that the State is bound by the provisions of this article, and that the provisions do not contravene the corporation act or the declared public policy of New Jersey. The State on the other hand contends that the amendment violates the provisions of the corporation law in that it is an amendment which does not further the purposes of the corporation; that it has an *ex post facto* effect upon the dividends declared by the Louisiana corporation; that it takes on the attributes of a private escheat law; that it does not operate upon dividends, since dividends from the date of declaration are trust funds and beyond the jurisdiction of the corporation to pass any resolutions or amendments to its charter affecting the same; that it impairs existing contractual rights; and that the amendment filed does violate the law and the public policy of the State of New Jersey.

This brings us, I suppose, to the question at issue, whether the amendment of the charter as provided by this amendment (n) is a valid exercise of corporate power so as to preclude or divest the State of New Jersey of its right to escheat the dividends under its custodial escheat law.

There is no doubt that parties to a contract have a right to impose contractual limitations, and cases have held that such contractual limitations are valid if they do not contravene a particular statute, and if the time fixed is not unreasonably short.

I think it is also well established that generally statutes of limitations which are adopted by states do not have retroactive effect unless the intent to do so is clear. The reason for this is so that vested contractual rights under existing laws are not disturbed. And even though such statutes of limitations might import to have retroactive effect, they have been held only to have prospective effect. The import of this amendment, as its language is set forth, is that it has both retrospective and prospective effect.

With respect to having any retroactive effect, it is my judgment that this cannot be for the reason that it does divest vested rights under existing contracts and under existing laws. Stockholders have the right to rely upon existing statutes of limitations, and any attempt by any amendment to a corporate charter to impair those rights in my opinion is void.

I am inclined to feel that where a stockholder leaves dividends with a corporation, unclaimed for a period of

time, it is done with a sense of confidence and trust in a corporation, and an attempt by a corporation to appropriate these dividends without notice is clearly and palpably wrong.

I think it can probably be inferred in this case that the stockholder whose dividends are being sought in this escheat action, in all likelihood did not consent to the amendment in question. There is certainly nothing in this case to indicate that the stockholders as such had notice of this amendment or assented to the appropriation of the dividends by the corporation.

Now, with respect to the effect of this amendment relating to stockholders of the corporation at the time of its adoption or subsequent thereto, or as related to stockholders who might have become stockholders at that time, it is likewise my judgment that this amendment is not valid for the reason that it contravenes the general public policy of the state. Clearly, the existence and the exercise of corporate powers are subject to the general public policy of the laws of the State of New Jersey. New Jersey, under its powers, has seen fit to adopt escheat laws to take unto itself the dividends of persons who do not claim same within the statutory period. Any attempt on the part of any corporation to subvert that public policy in my opinion is a power beyond that granted to a corporation. What the corporation is in effect attempting to do in this case as the result of the adoption of this amendment to its charter is in effect a private escheat law.

I feel that the contention that was made by the State that a charter and by-laws of a corporation create a contractual relationship with its stockholders is valid. The

cases that are set forth in the brief of the defendant primarily relate to insurance contracts; but in such a situation there is no question but that the parties have notice thereof. A copy of the contract is in the hands of the assured, and if a limitation is placed upon an assured to make a particular claim within a certain period of time, a specific clause in the contract sets that out. In this case, we have a situation of stockholders of a corporation disposing of property, and it might be inferred property of stockholders who had no notice of the amendment in question. There is nothing in the stock certificate that such a restriction exists upon the cashing of a dividend check. I can only presume that a dividend check of this corporation is like any other dividend check; that there is no statement therein that such a check must be cashed within three years.

We have also the problem that I suppose can be met by a person purchasing stock of the corporation at the present time, and clearly there is no indication that a person purchasing stock would have any notice of such a restriction upon the cashing of dividend checks.

To sum up what I have said, it is my conclusion that a corporation does not have the power to pass an amendment to its charter providing that if dividend checks are not presented within three years, that the sums revert to the corporation, on the ground that such an amendment is contrary to the public policy of the State.

With respect to the question of dividends: the contention that the State is entitled to dividends of the

persons who were stockholders of the Louisiana corporation but who failed to present these stock certificates for exchange, it is my judgment that the State is not entitled to any claim against any dividends or earnings to which those shares might be entitled. This stock was not presented for exchange. The dividends that were issued were declared by the New Jersey corporation, were declared solely upon the stock of the New Jersey Corporation.

Submit a judgment in accordance with my findings.

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 3722

Civil Action On Appeal

Mandate on Affirmance

State of New Jersey, by David D. Furman, Attorney General of the State of New Jersey,
Plaintiff-Respondent,

vs.

Jefferson Lake Sulphur Company, a corporation of the State of New Jersey,
Defendant-Appellant.

This cause having been duly argued before this Court by Mr. Eberhard Deutsch, of the Louisiana Bar, counsel for the appellant and Mr. Charles J. Kehoe, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the nineteenth day of February, 1962.

Filed
Feb 19 1962
John H Gildea
Clerk

JOHN H. GILDEA
Clerk of the Supreme Court

Judgment of the Superior Court Chancery Division

(Filed May 18, 1961.)

This matter having come on before this Court for hearing in the presence of Harry J. Diamond, Esq., Attorney Specially Designated To Prosecute The Action, and Charles J. Kehoe, Esq., Deputy Attorney General, attorneys representing the plaintiff, State of New Jersey, and Arthur C. Dwyer, Esq. of Stryker, Tams &

Dill, and Rene Himel, Esq. of Deutsch, Kerrigan & Stiles, attorneys representing the defendant, Jefferson Lake Sulphur Company, and this Court having considered the pleadings, stipulation of facts, exhibits, briefs and argument of counsel, it is on this 17th day of May, 1961.

Ordered that judgment be, and hereby is, given to the State of New Jersey for the aggregate of $5,657.46 based upon claims to dividends which claims consist of:

(a) $5,234.97 based upon claims to dividends declared by and originally payable by the Jefferson Lake Sulphur Company, Inc., a Louisiana corporation prior to December 30, 1949;

(b) $422.49 based upon claims to dividends declared by and originally payable by the defendant during the period December 31, 1949 to June 5, 1953.

It Is Further Ordered that upon entry of this judgment and service of a copy thereof upon the defendant, the said defendant shall pay to the State Treasurer for safekeeping by him $5,657.46, being the aggregate amount of the claims the custody of which is herein awarded to the State, and defendant shall deliver with said payment the information required by N. J. S. 2A:37-31 to the extent such information is available.

It Is Further Ordered that a counsel fee in the amount of $800.00 is allowed to Harry J. Diamond, Esq., who was the attorney appointed to prosecute this action and that a counsel fee in the amount of $400.00 is allowed to

Messrs. Stryker, Tams & Dill, attorneys for defendant, for services herein, which fees shall be deducted by the State Treasurer from the money received by him pursuant to this judgment, and by him paid upon receipt of such moneys from the defendant and a confirmatory order directing the payment of such fees shall have been entered by this Court.

s/ FRANK J. KINGFIELD,
J. S. C.

Revised Statutes of New Jersey, Title 2A, Chapter 37, Article 3:

Section 37-29: In addition to the method provided for the escheat generally of personal property as defined in article 2 of this chapter, an alternate method may be employed in certain cases defined in this article 3. By this latter method the state may take into its protective custody property consisting of cash, dividends, interest or wages owed by any corporation organized or doing business under the laws of this state, belonging to any person remaining unknown, or whose whereabouts is unknown, or whose property remains unclaimed as defined herein for a period of 5 successive years; and after a period of protective custody has expired as herein prescribed, the state may proceed to escheat such property to itself.

Section 37-30: Whenever a corporation organized under the laws of this state shall have custody or possession of,

or shall have deposited with or given to an agent or trustee residing within or without the state custody or possession of, any moneys which are or shall be payable to any person as a dividend upon the capital stock, preferred or common, of the corporation, or as interest payable upon the corporation's bonds, indentures, notes or other formal instruments evidencing the indebtedness of the corporation, or any moneys payable as wages from the corporation to any person, and whenever any person or any corporation organized under the laws of any other state and authorized to do business in this state shall have custody or possession of any moneys payable by such person or corporation to any person as wages earned within this state, or of any moneys otherwise having a situs within this state, which moneys are payable to any one person in any of the categories above enumerated and the owner of, beneficial owner of, or person entitled to the same has been and remains unknown for the period of 5 successive years, or the whereabouts of such person has been and remains unknown for the period of 5 successive years, or such personal property has been and remains unclaimed for the period of 5 successive years, then the superior court may in a summary action brought in the name of the state of New Jersey by the attorney general or such attorney-at-law as he may designate, direct the corporation or such other person aforesaid to deliver such moneys to the state treasurer for safekeeping.